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NO. 00-393

Supreme Court, U.S.
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IN THE

Supreme Court of United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,
Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For the Second Circuit

BRIEF OF *AMICI CURIAE* PATRICK LEAHY, JAMES JEFFORDS, BERNARD SANDERS, TOM TANCREDO, JEAN ANKENEY, WILLIAM DOYLE, JAMES LEDDY, JANET MUNT, J. WINTHROP SMITH, JR., BRYAN SULLIVANT, DEAN CORREN, DAVID DEEN, RICHARD PEMBROOKE, DAVID ZUCKERMAN, JOHN WITWER, PAUL TONKO, FRANK EGGER, PHIL MENDELSON, CHARLES SANTOS, TOM AMMIANO, VERMONT LEAGUE OF CITIES AND TOWNS, CONNECTICUT RIVER WATERSHED COUNCIL, *et al.*

SENATOR PATRICK LEAHY
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QUESTION PRESENTED

Whether Congress and the Federal Communications Commission, by requiring State or local zoning authorities to issue, or not issue, building permits for the construction of personal wireless service facilities under specific federal mandates or limitations have thereby commandeered state governmental processes in violation of the Tenth Amendment as interpreted by this Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

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BRIEF OF *AMICI CURIAE* PATRICK J. LEAHY AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioners.[1]

INTEREST OF *AMICI CURIAE*

Patrick J. Leahy is a resident of Vermont and represents that state in the Senate of the United States of America, along with Senator James Jeffords. Congressman Bernard Sanders also represents Vermont as a Member of the United States House of Representatives. Congressman Tom Tancredo, represents Colorado as a member of the United States House of Representatives. Additional *amici* are: Jean Ankeney, Vermont State Senator; William Doyle, Vermont State Senator; James Leddy, Vermont State Senator; Janet Munt, Vermont State Senator; J. Winthrop Smith Jr., Connecticut State Senator; Bryan Sullivant, Colorado State Senator; Dean Corren, Vermont State Representative; David Deen, Vermont State Representative; Richard Pembroke, Vermont State Representative; David Zuckerman, Vermont State Representative; John Witwer, Colorado State Representative; Paul Tonko, New York State Assemblyman; Frank Egger, Mayor of Fairfax, California; Phil Mendelson, Washington D.C. Councilmember; Charles Santos, El Cajon, California, Councilmember; Tom Ammiano, San Francisco, California, County Supervisor; the Vermont League of

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[1]Pursuant to Rule 37 of the Rule of the Court, Petitioners and Respondents have consented to the filing of this brief and their consent letters are filed herewith. No counsel for either party authored this brief amici curiae, either in whole or in part. Furthermore, no persons other than amici curiae contributed financially to the preparation of this brief.

Cities and Towns; the Connecticut River Watershed Council; sixty-eight Vermont cities and towns; and one Colorado city. These federal, state and local representatives are residents of the region which they represent and have an interest in the proper application of federal law nationally, as well as specifically in Vermont, Connecticut, Colorado, New York, California, and the District of Columbia, and thus seek to provide guidance in this matter as friends of this Honorable Court. Further, these towns and officials seek not to be commandeered by the Federal Communications Commission to issue, or not to issue, building permits but instead to be able to protect the interests of residents in the exercise of state control over health, public safety and land use matters through a proper balancing of local interests with a federal goal of promoting more celluar phone service. Petitioners are "Citizens for the Appropriate Placement of Telecommunications Facilities" of Charlotte, Vermont, together with a number of other community citizens organizations and other citizens.

State and local zoning authorities, under principles articulated in *New York v. United States* by this Honorable Court, may not have their processes commandeered to implement a federal policy issued by the Federal Communications Commission which seeks to override local control over health, safety and local land use issues regarding the siting of personal wireless services facilities (PWSF), such as cell phone towers, by compelling an outcome determined by the Congress – the mandatory issuance, or non-issuance, of local construction permits if certain federal conditions are met. As is carefully articulated in an opinion by the Honorable Judge Niemeyer regarding the siting of a cellular phone tower in Nottoway County, Virginia, "the imposition of that federal standard [the federal tower siting provision at issue in this matter, i.e. 47 U.S.C. § 332(c)(7)(B)] on the [zoning] Board commandeers its legisla-

tive process, and thus the [provision] is unconstitutional."[2] *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d at 706 (4th Cir. 2000).

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to urge the Court to grant the Petition for Writ of Certiorari.[3] We respectfully urge that the Court of Appeals decision be reversed as inconsistent with principles articulated by this Court in *New York v. United States* and by the Fourth Circuit in *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) and that 47 U.S.C. § 332(c)(7)(B) be declared unconstitutional. The authority of the Federal Communications Commission to commandeer the actions of local zoning authorities and mandate that they issue, or not issue, building permits precludes such local authorities from exercising power regarding health, safety and local land use issues and is not consistent with the Tenth Amendment of the United States Constitution. Review is also sought to resolve the direct conflict between the Second Circuit decision and a recent opinion by Fourth Circuit Judge Niemeyer in *Petersburg*, 205 F.3d 688.

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[2]Judge Widener concurred in the order of Judge Niemeyer to reverse and remand the case to the district court with instruction to vacate its writ of mandamus but for different reasons. Judge Niemeyer determined that 47 U.S.C. § 332(c)(7)(B)(iii) [reprinted in Appendix A-30 of the petition for writ of certiorari submitted by Whitney North Seymour, Jr., for petitioners, Docket No. 00-393] is unconstitutional under the 10th Amendment.

[3]The amici in this matter commend fellow petitioners for writs of certiorari: David Fichtenberg, petitioner, pro se, of Olympia, Washington; Michael C. Worsham, petitioner, pro se, of Forest Hill, Maryland; and Cellular Phone Taskforce, Arthur Firstenberg and Richard Targow, Counsel of Record. The amici on this brief urge this Honorable Court to carefully consider the additional points brought out in those petitions.

This case is thus a challenge to the Constitutionality of section 704(a) of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)) and to the implementing regulations of the Federal Communications Commission.[4] In *New York v. United States*, 505 U.S. 144 (1992), this Court determined that under the Tenth Amendment, Congress could not directly compel states to pass legislation or carry out a federal regulatory program to address the critical problem of the shortage of hazardous radioactive waste disposal sites.[5] In this matter Congress enacted legislation regarding the siting of cellular phone towers that imposed conditions and limitations on State or local zoning authorities designed to carry out federal goals. For example, under 47 U.S.C. § 332(c)(7)(B) State or local zoning authorities may not refuse to issue a permit if doing so would "prohibit or have the effect of prohibiting the provision of personal wireless service," nor can such authorities refuse to act "on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality...," and any local decision must be "in writing and supported by substantial evidence contained in a written record."

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[4]The Vermont Congressional delegation filed a brief amici curiae supporting a petition for a writ of certiorari in a case involving the siting of a radio broadcast tower containing cellular phone facilities in the town of Charlotte, Vermont (Graeme Freeman, et al., v. Burlington Broadcasters, Inc., et al, 2000 U.S. Lexis 6516, October 2, 2000) in which the petition for certiorari was recently denied. Tenth Amendment issues were raised in that brief but the major argument presented was that Congress did not provide the Federal Communications Commission with any authority to preempt local and state authority over the siting of radio broadcast towers and further that towns have the authority to enforce zoning agreements made before construction of a radio broadcast tower with the owner of the radio broadcast tower who subsequently violated those agreements in the operation of tower facilities.

[5]Also see *Printz v. United States*, 521 U.S. 898 (1997).

Basically, section 332(c)(7)(B), and the FCC implementing regulations, flatly mandate that State or local zoning authorities implement several federal requirements or limitations regarding the issuance of building permits. It is this type of direct commandeering of state functions which was found to be unconstitutional in *New York v. U.S.* (regarding nuclear waste sites) by this Court and unconstitutional in *Petersburg*, (regarding the siting of cellular phone towers) by the Fourth Circuit.

Section 704 of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)), is an attempt to compel State or local zoning officials to address the alleged public policy problem (as determined by the Congress and the Federal Communications Commission) regarding the shortage of personal wireless services facilities (PWSF) even when granting building permits for additional PWSF in some circumstances would be inconsistent with state decisions designed to protect the health and safety of local residents.

In general, *amici* urge that this issue is of great importance because of the dramatic increase in the siting, construction and use of telecommunications and radio towers in communities throughout the United States.[6] The location of such towers near homes, schools, farms, churches, hospitals, airports, highways, and the whole host of work and home environments is of great importance to the States, to local governments and citizens. There is significant concern by homeowners living near potential tower sites regarding financial harm they would suffer from reductions in the value of their property if the towers were to be

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[6]Note, Wireless Facilities Are A Towering Problem, 40 Wm. & Mary L. Rev. 975, 979 (1999).

built.[7]

In addition, there is growing public and scientific concern over the adverse effects of radio frequency emissions emanating from cellular phone facilities and, of course, there have been many newspaper articles about car accidents involving drivers talking on a cell phone.[8] Also, it is our understanding that, while the FCC has established standards for the "thermal effects" from such radiation the FCC has not issued emission standards based on non-thermal biological effects at below-heating levels which may cause biological harm.[9]

Amici urge that the United States Constitution delineates,

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[7]See note 6 and "Cell Towers Are Sprouting in Unlikely Places," *The New York Times*, January 9, 2000 (fears that property values could drop between 5 and 40 percent because of neighboring cell towers); "Quarrel over Phone Tower Now Court's Call," *Chicago Tribune*, January 18, 2000 (fear of lowered property values due to cell tower); "The Future is Here, and It's Ugly: a Spreading of Techno-blight of Wires, Cables and Towers Sparks a Revolt," *New York Times*, September 7, 2000; "GTE Wireless Loses Lawsuit over Cell-phone Tower," *The Houston Chronicle*, February 23, 1999 (property values depreciate by about 10 percent because of the tower); "Tower Plan Ripped," *Anchorage Daily News*, December 3, 1999 (tower could lower property values).

[8]Mark Alpert, "Biophysics–Radiation Hazards: Worrying About Wireless," *Scientific American*, p. 20-21. (September 2000) This article discusses animal studies on the possible carcinogenic effects of cell phone radiation. Indeed, maximum emission standards set by many other countries throughout the world are more protective – lower – than FCC permitted levels. See pages 9 and 10 of the Petition for Writ of Certiorari, Whitney North Seymour, Jr., Counsel of Record, Docket No. 00-393.

[9]For example, the United Kingdom Independent Expert Group on Mobile Phones, commissioned by the British Government, recommended that children under age sixteen be discouraged from using cell phones in a report issued on April 28, 2000 (available at http://www.iegmp.org.uk). That report also recommends that cell phone antenna not be built near schools, hospitals and residences. Also see note 8.

in many instances, the respective roles of the federal government, the States, or the people, and that granting the petition for writ of certiorari in this matter will allow this Honorable Court to ensure that the priciples set fourth in *New York v. United States* are properly applied by the Congress and the Federal Communications Commission with respect to the sovereign states regarding issues of public health and safety, and local land use decisions.

ARGUMENT

SECTION 704 OF THE TELECOMMUNICATIONS ACT OF 1996, AND IMPLEMENTING FEDERAL COMMUNICATIONS COMMISSION REGULATIONS, ARE UNCONSTITUTIONAL UNDER THE 10TH AMENDMENT IN THAT THEY COMMANDEER STATE AND LOCAL ZONING AUTHORITIES TO APPROVE, OR DISAPPROVE, BUILDING PERMITS UNDER SPECIFIC FEDERAL MANDATES.

Amici urge that the United States Constitution and federal law establishes a balancing system within which states, and local governments, through the exercise of local health and safety powers, and certain powers over the use of land, have a significant role in the location, construction and use of these PWSF except in certain circumstances where Congress has specifically provided otherwise in a manner consistent with the United States Constitution.

However, the Constitution and its Tenth Amendment does not permit the Congress to destroy this partnership of the Federal government (the Federal Communications Commission, in this matter) with the sovereign states and does not allow local or state processes to be commandeered to blindly imple-

ment the federal goal of promoting more cellular phone service in the face of plenary police powers held by the states.

The Framers of the Constitution "designed a system in which the state and federal governments would exercise concurrent authority over the people – who were, in Hamilton's words, 'the only proper objects of government.'" *Printz v. U.S.*, 521 U.S. at 919-20 (quoting The Federalist No. 15). Indeed this Court has pointed out that the "Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states." *New York v. U.S.*, 505 U.S. at 166.

Fourth Circuit Judge Niemeyer noted that the provision in question, part of section 704 of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)(iii)), commandeers the "County's legislative process and is therefore unconstitutional under the Tenth Amendment." *Petersburg*, 205 F.3d at 705 (concur. op.). That provision was declared constitutionally fatal, in that State or local zoning officials must accept the siting of a PWSF unless the zoning authority denies a request in a particular manner – "in writing and supported by substantial evidence contained in a written record."

Section 704(a), codified at 47 U.S.C. § 332(c)(7)(B)(the "Limitations" part of the paragraph), imposes several specific duties on State or local governments or their instrumentalities. These mandates include that the State or local government (normally a zoning authority): (1) may not deny a permit if that has the "effect of prohibiting the provision of personal wireless service"; (2) must issue denials of a permit "in writing and supported by substantial evidence contained in a written record"; and (3) may not delay any permit decision beyond a "reasonable time."

State and local authority over land use and over the health

and safety of its citizens is a primary responsibility of state and local governments under our federal system. This Court noted in *New York v. U.S.*, regarding nuclear waste sites that: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. U.S.*, 505 U.S. at 166. In this matter regarding cellular tower sites, Congress and the FCC attempt to compel certain actions or prohibit certain actions of State and local zoning authorities under Federal conditions. Yet, under our Constitution, Congress may not "conscript state governments as its agents." *Id.* at 178.

CONCLUSION

For the foregoing reasons, the *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari concerning the Constitutionality of 47 U.S.C. § 332(c)(7)(B). We agree with Judge Niemeyer in his application of the principles set forth in opinions of this court – in *New York v. U.S.* and *Printz v. U.S.* – to the Constitutionality of the same federal provision in question in this matter (47 U.S.C. § 332(c)(7)(B)) regarding the siting of a cellular phone tower in Nottoway County, Virginia.

In his decision, Judge Niemeyer writes:

> However, in the area of regulating the location of communications facilities, Congress was understandably reluctant to assert its preemption rights to deprive state and local governments of their important zoning and permit authority. It recognized that erecting telecommunications towers is of significant local interest and can be controversial due to both rational and irrational

> concerns of residents in the community. Moreover, preserving local legislative processes would make local officials accountable for land use decisions. Yet, Congress did not wish to cede control over the implementation of its policy of promoting the erection of communications facilities to localities that were often hostile to such facilities. Thus, through a compromise involving a partial preemption approach, it enacted § 704(a) of the Telecommunications Act, imposing federal standards on state and local legislative processes, thus leaving state and local legislative boards responsible and accountable for any fall-out in making siting decisions. Through this blend of assigned power, Congress apparently believed it could effect a federal policy promoting the erection of telecommunications towers, while preserving local interests in the process. But this particular blend erases the constitutional lines dividing power between the federal and state sovereigns and therefore becomes a categorical violation of the Tenth Amendment.

Petersburg, 205 F.3d 705-06.

We respectfully urge this Court to hear this matter by granting the petition for Writ of Certiorari for Docket 00-393.

Respectfully Submitted,
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Town of Middlebury, Vermont
Town of Middlesex, Vermont
Town of Mount Holly, Vermont
Town of Newbury, Vermont
Town of Newfane, Vermont
Town and Village of Northfield, Vermont
Town of Norwich, Vermont
Town of Orwell, Vermont
Town of Pawlet, Vermont
Town of Peru, Vermont
Town of Pittsford, Vermont
Town of Plainfield, Vermont
Town of Richford, Vermont
Town of Richmond, Vermont
Town of Rochester, Vermont
Town of Roxbury, Vermont

City of Rutland, Vermont
Town of Sandgate, Vermont
Town of Shoreham, Vermont
City of South Burlington, Vermont
City of St. Albans, Vermont
Town of Stamford, Vermont
Town of Starksboro, Vermont
Town of Swanton, Vermont
Town of Tinmouth, Vermont
Town of Walden, Vermont
Town of Washington, Vermont
Town of Waterbury, Vermont
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